IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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No. 71-688

ANTHONY R. LaDUCA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Statement of Jurisdiction	1
Questions Presented for Review	2
Statutes Involved	3
Statement of the Case	4
Reasons Why Certiorari Should Be Allowed	23
Argument:	
Point One—The Second Circuit has decided an important question of law which has not been, but should be, decided by this court, viz., whether an attorney who negotiates for a client with the owner or insurer of goods stolen in another state for the payment of a reward, and its amount, for the return of such goods to such owner or insurer, is guilty of conspiracy to violate Sections 2314 and/or 2315 of Title 18, where such attorney, on ascertaining from his client that the latter will not return the goods unless he receives a reward in an amount satisfactory to him, notifies the owner or insurer that he, the attorney, is out of the case and will not any longer represent the client	23
A. Sections 2314 and 2315 of Title 18 do not make unlawful the interstate transportation of stolen goods to return them to a person legally entitled to them, or to claim a reward in an amount offered by or agreeable to such person	24

PAGE

B. The Government had the burden of proving that La Duca agreed to the unlawful purpose charged in the indictment, and such burden of proof was not discharged 26

Point Two—The Second Circuit has decided important questions on the law of perjury before a grand jury, which decision is in conflict with applicable decisions of other courts of appeals, viz.:

If any one of conjoined questions can truthfully be answered "no," can a "no" answer to the whole of the conjoined questions be perjury?

Can perjury be validly assigned where an answer is literally accurate, technically responsive or legally truthful?

Can perjury be validly assigned where an answer under oath is met by no more than a prior unsworn inconsistent statement?

Can perjury be founded upon the answer to a question admitting of several plausible meanings? 36

A. Question-and-answer No. 1 was not proven false 37

B. Question-and-answer No. 2, was not proven false 40

C. Question-and-answer No. 3 was not proven false 40

D. Question-and-answer No. 4 was not false 41

PAGE

E. Question-and-answer No. 5 was not proven false 41

CONCLUSION 43

APPENDIX:

Judgment of the United States Court of Appeals 1a

Cases Cited

Automobile Ins. Co. of Hartford, Conn. v. Kirby, 144 So. 123 (Ala. App. 1932) 30

Compagnie Francaise de Navigation a Vapeur v. Elting, 19 F. 2d 773 (2 Cir. 1927) 24

Hart v. United States, 131 F. 2d 59 (9 Cir. 1942) 39, 43

Luse v. United States, 49 F. 2d 241 (9 Cir. 1931) 38

Miller v. United States, 382 F. 2d 583 (9 Cir. 1967) 23, 26

Smith v. United States, 169 F. 2d 118 (6 Cir. 1948) 39, 43

State v. Burns, 9 N. W. 2d 518 (Sup. Ct. of Minn. 1943) 23, 32

State v. Nutley, 24 Wis. 2d 527, 129 N. W. 2d 155, 167 (1964) 23

United States v. Aviles, 274 F. 2d 179 (2 Cir. 1960) 32

United States v. Ford, 324 F. 2d 950 (7 Cir. 1963) 26

United States v. Goldberg, 290 F. 2d 729 (2 Cir. 1961) 39

United States v. Goss, 329 F. 2d 180 (4 Cir. 1964) 27

United States v. Handler, 142 F. 2d 351 (2 Cir. 1944) cert. den. 323 U. S. 741 24

PAGE

United States v. Hurley, 281 F. Supp. 443 (D. Conn. 1968) 32, 35

United States v. Peoni, 100 F. 2d 401 (2 Cir. 1938) 26, 35

United States v. Sheridan, 329 U. S. 379 (1946) 24, 26, 33-35

United States v. Spock, 416 F. 2d 165 (1 Cir. 1969) 26

United States v. Wall, 371 F. 2d 398 (6 Cir. 1967) 40

Wolf v. United States, 238 F. 902, 906 (4 Cir. 1916) 43

Statutes Cited

18 U.S.C.A.:

371 4

1621 4

2314 ..... 2-4, 24, 26, 27, 32, 33

2315 ..... 2-4, 24, 26, 27, 32

28 U.S.C. 1254 2

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Opinion Below

There were no opinions below.

Statement of Jurisdiction

The date and time of entry of the judgment of the Second Circuit, here sought to be reviewed, is October 29, 1971.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254.

Questions Presented for Review

1. Was the evidence sufficient to show that La Duca agreed to the criminal purpose charged, or to any criminal purpose?

2. Do sections 2314 and 2315 of Title 18 make unlawful the interstate transportation of stolen goods to return them to a person legally entitled to them, or to claim a reward in an amount offered by or agreeable to such person?

3. Did not the Government have the burden of proving that La Duca agreed to the unlawful purpose charged in the indictment?

4. Did the Government prove falsity in respect of the questions and answers set out in the perjury count of the indictment?

5. If any one of conjoined questions can truthfully be answered "no," then can a "no" answer to the whole of the conjoined questions be perjury?

6. Can perjury be validly assigned where an answer is literally accurate, technically responsive or legally truthful?

7. Can perjury be validly assigned where an answer under oath is met by no more than a prior unsworn inconsistent statement?

8. Can perjury be founded upon the answer to a question admitting of several plausible meanings?

9. Should not La Duca's acquittal on both charges be ordered by this Court?

10. May not this Court reverse on one count, and affirm or remand on the other?

11. In the alternative, should not both counts be remanded for a new trial?

Statutes Involved

18 U.S.C.A., Section 2314 (Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting), provides, in part:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *.
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A., Section 2315 (Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps), provides, in part:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, * * * moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken * * *.
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U.S.C.A., Section 371 (Conspiracy to commit offense or to defraud United States), provides, in part:

> "If two or more persons conspire either to commit any offense against the United States, * * * in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C.A., Section 1621 (Perjury generally), provides, in part:

> "Whoever, having taken an oath before a competent tribunal, * * * in any case in which a law of the United States authorizes an oath to be administered that he will testify * * * truly, * * * willfully and contrary to such oath states * * * any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Statement of the Case

Petitioner, Anthony La Duca, who was and is a practicing attorney of the State of New Jersey, was brought to trial before a jury and convicted under an indictment for conspiracy to violate Title 18, United States Code, Sections 2314 and 2315, and for perjury before a United States grand jury in the Southern District of New York (R3a to 8a).

The indictment was in three counts. Here we note ERRATUM: In the appendix, the conspiracy and perjury

counts are jumbled together. They should be read as follows: conspiracy count, or first count, R3a, 6a and 7a; count two is a perjury count, R4a, 5a and 8a. Count 3 was another perjury count, which was dismissed by the trial judge (R210a-23 to 211a-5), and has therefore not been reproduced in the appendix.

The first count of the indictment named 2 defendants, La Duca and another man, J. George Ivler (R3a). The latter was acquitted by the jury (R326a-22, 23). The second and third, or perjury counts, named only La Duca.

The first count (R3a, 6a, 7a) reads as follows:

"The Grand Jury charges:

"1. From on or about the 1st day of January, 1969 up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, Anthony La Duca and J. George Ivler, the defendants, unlawfully, wilfully and knowingly did conspire, combine, confederate and agree together and with each other and with other persons to the Grand Jury unknown to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 2314 and 2315.

"2. It was a part of said conspiracy that Anthony La Duca, the defendant, and others, would barter, sell and dispose of, and cause the barter, sale and disposition of, goods of a value of more than $5,000, to wit, thirty stolen porcelain art objects which were would be moving as, and which were and would be a part of (6a) and which constituted and would constitute interstate and foreign commerce, knowing the said art objects to have been stolen.

"3. It was a further part of said conspiracy that Anthony La Duca, the defendant, and others, would transport, and cause the transportation of, in interstate and foreign commerce, to wit, from the State of New Jersey to Manhattan Island in the State of New York, goods of a value of more than $5,000, to wit, the thirty stolen ~~porcelain art~~ objects referred to in paragraph 2 above knowing the said art objects to have been stolen.

"4. It was a further part of said conspiracy that Anthony La Duca and J. George Ivler, the defendants, would visit the person from whom the said art objects had been stolen with the purpose of obtaining money from said person for the return of said art objects.

"5. It was a further part of said conspiracy that the defendant Anthony La Duca would meet with a representative of the company which had insured the porcelain art objects against theft for the purpose of obtaining money for the transfer of said art objects to the insurance company.

"6. It was a further part of said conspiracy that Anthony La Duca and J. George Ivler, the defendants, would share in the proceeds paid by the insurance company (7a) referred to in paragraph 4 of this indictment, for the return of the said art objects.

"Overt Acts

"In furtherance of said conspiracy and to effect the objects thereof, the following overt acts among others were committed within the Southern District of New York:

"1. On or about the 23rd day of January, 1970, Anthony La Duca met in the Gotham Hotel, 5th

Avenue and 55th Street, New York, New York, with a representative of Lloyds of London.

"2. On or about the 20th day of January, 1970, Anthony La Duca and J. George Ivler, the defendants, went to Antiques of New York, 48 East 57th Street, New York, New York.

"(Title 18, United States Code, Section 371.)"

The second count (R4a, 5a) reads as follows:

"The Grand Jury further charges:

"1. In October 1970, a Grand Jury of the United States of America, duly empaneled and sworn in the United States District Court for the Southern District of New York, and inquiring for that district in a proceeding in which a law of the United States authorizes an oath to be administered, conducted an investigation, which continued before said Grand Jurors up to and including the date of the filing of this indictment, pertaining to possible violations of Title 18, United States Code, Sections 371, 2314 and 2315, for the purpose of determining among other things, whether Anthony La Duca and J. George Ivler, the defendants, knowingly participated in the ransoming, to an insurance company, of property which had been insured against theft by such company and which had been stolen.

"2. It was material to said Grand Jury investigations to determine whether Anthony La Duca and J. George Ivler, the defendants, knew that certain property was stolen and, if so, when he became aware that it was stolen.

"3. On or about October 15, 1970, in the Southern District of New York, Anthony La Duca, the de-

fendant, having duly taken an oath before the competent tribunal described in paragraph 1 of this count of this indictment that he would testify truly (5a) did ~~unlaw~~fully, wilfully and knowingly and contrary to said oath give the following false testimony before said tribunal with respect to the aforesaid material matters, which testimony Anthony La Duca, then and there well knew and believed to be untrue:

"COUNT TWO

"Q. Did he say whether it had disclosed whether they were stolen or why these articles were newsworthy? Did he ever tell you that they were stolen?

"A. No.

* * *

"Q. Did he say if the private detective had discovered that they were stolen?

"A. No.

* * *

"Q. Well, how about a report that you found out that they had been stolen from a Mr. Weinberg?

"A. I think we ultimately discovered that, whether the client knew it or not, I don't know, but I discovered it.

"Q. How did you discover it?

"A. We went in to see Mr. Weinberg.

* * *

"Q. You didn't know that these belonged to Mr. Weinberg prior to the time that you called Teplis & Harding?

"A. No.

"Title 18, United States Code, Section 1621.)"

La Duca was convicted on Counts 1 and 2, sentenced to 1 year on each, to run concurrently, and released on his own recognizance pending appeal (R17a).

The testimony below on the Government's case was substantially as follows:

Lawrence Diamond, a New Jersey lawyer (R23a-10, 11), testified that, shortly after he ceased being a member of the Ethics Committee of the New Jersey Bar, he received a visit from La Duca (R23a-25 to 24a-11). As to this, Mr. Diamond testified (R25a-12 to 24):

> "* * * He told me that a client of his had consulted with him, informing that a relative of the client who passed away, and among the personal effects of the decedent had been some alleged antique articles and that in a box, paper box or shoe box, some papers and newspaper article concerning an alleged theft of some antique.
>
> "He said that his client wanted him to find out if there was a reward offered for these antiques, if they had in fact been stolen, and wanted to know whether it was ethical for him to step and do this chore for the client.
>
> "I said that it was because I felt that he was simply an agent of the man, he wasn't hired as attorney for a suspect, a criminal suspect."

Robert McGraw, an insurance adjuster for the firm of Toplis and Harding, independent insurance adjusters for Lloyds in New York (R38a-9 to 12), testified that, on January 16, 1970, he received a telephone call in connection with some antiques (R38a-19 to 22). "I received a call from an individual who said he was an attorney. I didn't ask his name; he didn't offer it." (R39a-4 to 7). He further testified (R40a-22 to 42a-21):

"A. The man I was speaking to on the telephone advised me that he had a client who had, in the client's possession, a quantity of antiques which he believed were stolen from the Antique Company of New York.

"Q. Do you know who owns the Antique Company of New York? (41a) A. I know a Mr. Hanns Weinberg who is the associate. I don't know if he is the owner of the corporation or what, but I know he is associated with them.

"And at that time I was handling insurance claims for the insurance of the Antique Company of New York.

"The individual on the telephone indicated that his client had come by the property innocently and that he was looking for a reward. And that is more or less the sum and substance.

"I advised him that I would look into the possibility of our office handling such a loss, as he did indicate it was in a large quantity, approximately a quarter of a million dollars in value, that property, and that we should discuss it further.

"The individual advised me he would call me the following Monday. * * *

"Q. And what did you state to the person on the other end of the phone, if anything, about whether you would give (42a) him a reward. A. To the best of my recollection, I would have informed him that we do not have any money here, the underwriters that I work for, and it would be necessary for me to find out if we had handled a claim for the underwriters covering the loss of this size;

quantity of property for this particular antique dealer in New York, and without knowing this I couldn't go any further.

"* * * It was agreed that he would call me back the following Monday, which was January 19th.

"Q. And did you receive a call back the following Monday? A. Yes, I did.

"* * * I advised the individual that I could not find any record of having handled such a claim and referred him directly over to Mr. Weinberg of the Antique Company of New York."

Hanns Weinberg, the antique dealer (R47a-15) testified that he suffered a burglary from his store in New York the night of the 13th or 14th, June, 1966 (R48a-13 to 21). French snuff boxes were stolen, altogether 30 items (R48a-24 to 49a-2); including cane handles, porcelain handles (R54a-9 to 12).

A few days after January 15, 1970, he received a visit from a Mr. La Duca and another gentleman, whom he identified in the courtroom as the co-defendant Ivler (R59a-2; 59a-17 to 60a-9). He further testified (R60a-13 to 62a-24):

"Q. * * * what happened on that occasion? A. Mr. La Duca told me that a client of his had told him he has found a parcel with certain—or some goods which seemed to be—the goods which have been once stolen from us. My first question, our goods the man knows they are part of, come from us; Mr. La Duca told me in that parcel according to his client, a newspaper article which reported to be robbery which we had experienced.

"Mr. La Duca told me could it be possible that his client return the goods, he would advise him to do

so, but he thought perhaps I could consider whether I couldn't make any—he did never ask for anything, but he wanted ask perhaps his client would expect a reward, perhaps.

"(61a) I repeat, he never said I should offer anything. I told him that I not any more—that means I could not make any claim, but the claim must come in behalf of my insurance company, lawyers for the company.

"And he told—I asked him. He told me he'd seen—I think he described to me one or two pieces which his client showed him and a description was so that it seemed to me this piece belonged to things which had been burgled from us.

"* * * He described one or two pieces which the client had shown him. I told I could imagine that the insurance company—we would be interested very much in getting the goods back. But I suggested that the goods should be delivered to the police either—for identification, identify them.

"But I suggested have the goods delivered to the police and we or the insurance company would deposit a check and I mentions 7½ thousand dollars which should be paid to the finder of the goods, if the goods are ours. * * *

"Q. Did Mr. La Duca say anything? A. Yes, Mr. La Duca told me, 'In America we handle it differently,' we had to give the money in cash, not in check.

"I told him we wouldn't—we wouldn't offer it in (62a) cash. And somehow these goods could be original, and I asked him to let me have first photos of the goods to see whether they are our goods

at all, so if other 20 objects of that kind could be found, it's far remote.

"Q. You say it's remote there would be any others like that than yours? What did you say? A. I said it's hardly possible. We couldn't get anywhere back the collection, it doesn't exist.

* * *

"Q. Did he agree to send you photographs? A. Mr. La Duca sent me photos.

"Q. Did you receive some photographs in the mail? A. I received photos, yes, and handed the photos over to the police.

"Q. When was it that you received photographs?

* * *

"* * * A. I don't know. Two or three days, I wouldn't know."

He further testified (R64a-16 to 18):

"A. Look, the photos are not very good, but altogether these photos don't leave any doubt in my mind they are out (our) goods, the goods that have been burgled from us."

On *cross*, he testified (R91a-8 to 11):

"* * * Mr. La Duca told me his client expect, of course, a reward.

"He never asked for money. His client asked what I would think, if I could make any suggestions."

He further testified (R92a-4 to 93a-4):

"A. Mr. La Duca told me—first he came to us about concern we get the goods back. He did not say he wants money, but he told me in a—so I ask him

if he would find, for instance, in Germany anything you would get a reward, in England you would probably get an award, in America you don't get a reward, but I told—he said to me better we were prepared to give the man who found the parcel a reward.

"My answer was you should make a suggestion.

"He couldn't make any suggestion, and he didn't.

"And I told him we would very much be interested to get the goods back and I think the insurance would be agreeable to how much we would suggest, but I would suggest that the man's subject, if he is an honest finder, should get $7500, and Mr. La Duca asked me, how can we identify the goods.

"So he wanted to identify that I am prepared to talk the insurance and if the goods would be deposited with the police, we would deposit a few months' check for $7500 and then we would ask the police, I would talk to the police, but only in the office, see whether they are the same goods and the men can get the (93a) money.

"Mr. La Duca did not know whether his clients would be satisfied with that amount."

Joseph M. Chapman, a security consultant (R124a-11), testified that he was asked by the underwriters at Lloyds, in 1966 (R124a-24), to evaluate the physical and procedural security at the Antique Porcelain Company of New York (R125a-2 to 5). In the week of January 19, 1970, he received a telephone call from Mr. Hans Weinberg and went to his office (R127a-32 to 128-5). There were present the witness, Mr. Weinberg and during part of

the conversation, his daughter. After that conversation, "I contacted and met with Detective Jerry Lurie and Detective Sergeant Kolembacher at New York City Police Department headquarters. * * * Detective Lurie accompanied me to the Gotham Hotel and I rented two adjourning rooms in the Gotham—one of which I occupied under the name of Chamberlain, and the other room was occupied by Detective Lurie." He spent the night there on January 22 (R128a-10 to 25).

On the following day, January 23, "I received a telephone call from a Mr. La Duca, during which time we made an agreement to meet at seven p.m. on the evening of the 23rd in the cocktail lounge of the Gotham Hotel. * * * Mr. La Duca was returning my call. I had placed a call to his number on the 22nd and he returned my call on the 23rd, and in our conversation then I told him that I was representing the London brokerage firm that had placed the insurance on the Antique Porcelain Company of New York and mentioned that I had spoken with Mr. Weinberg." (R129a-2 to 18)

"Mr. La Duca told me that he was representing a client who had found a collection of porcelain items in a box which was among the effects of a deceased relative, and that the client felt that he was entitled to a reward for finding these lost items." (R129a-19 to 23)

"He told me that Mr. Weinberg had indicated that there may be a potential for a reward of ten per cent of (130a) the insured value, which would be $7500." (R129a-24 to 130a-2)

"And Mr. La Duca said that he did not feel that his client would be satisfied with that small amount and we agreed that we would meet and discuss the means by which these items could be recovered in exchange for sums of money." (R130a-3 to 7)

"By a telephone message that was received at the hotel operator's desk during my absence from the room, Mr. La Duca postponed the meeting from seven until nine p.m. and we subsequently met at nine p.m. in the cocktail lounge of the Gotham Hotel." (R130a-10 to 14)

"By prior arrangement there were three detectives from the New York City Police Department. There were other people then unknown to me, and a young lady was introduced to me by Mr. La Duca as his fiancee." (R130a-19 to 22) They were not all sitting at the same table. The detectives were not part of the party; their presence was not made known (R131a-7 to 18).

Chapman further testified (R131a-22 to 136a-5):

"A. The conversation began at approximately nine p.m. and lasted until approximately midnight.

"It was during this conversation that I asked Mr. La Duca to please explain to me his particular involve-(132a)ment or concern in this matter that was now again of interest to underwriters at Lloyds.

"He related to me that he had been approached sometime before by a client whom he was now representing and that this client had told him that subsequent to the death of a relative the client had searched through the personal effects of the relative, had found a cardboard box which contained a number of small items, each one of which had a paper sticker with a number affixed, and also in the box there was a portion of a newspaper clipping.

"He told me that his client originally retained a private investigator and the investigator spent con-

siderable time trying to determine the identity of the owner of these objects; that when the private investigator was satisfied that these objects had been taken in a theft from the Antique Porcelain Company of New York, the private investigator attempted to determine who the insurer was but because the private investigator was so costly the client came to Mr. La Duca and asked him to represent him in achieving a reward for the finding of these items.

"During the conversation I asked Mr. La Duca how he felt we could possibly bring about the recovery of these items and considerable time was devoted to coming (133a) to an agreement as to how the items could be surrendered for individual inspection and a sum or sums of money could be surrendered in exchange for each item or each lot of items that was subsequently inspected and found to be in satisfactory condition. * * *

"* * * Mr. La Duca said he felt he would have to speak to his client in that regard, but he interjected that he did not feel his client would be satisfied with the amount offered or mentioned by Mr. Weinberg, $7500, that he felt his client was convinced that he was entitled to a greater amount.

"(134a) Q. Did he mention the amount? A. I believe the amount mentioned was $35,000. I asked Mr. La Duca if when we were able to achieve an agreement as to how to inspect and transfer these items, whether it would be a lengthy process. And he remarked it would not be.

"He said that the items could be brought over very quickly. He said his client was only 20 minutes

away and I expressed surprise and—well, we just drove up the West Side Drive over the George Washington Bridge. It's only 20 minutes away.

"There was extensive other conversation that seems unrelated to this matter. Mr. La Duca and I parted company at about midnight with his last remark to me that he would call me the next day.

"Q. Had Mr. La Duca, in response to your initial question, said anything with respect to his financial arrangement with his client? A. Yes. He explained that he was to receive a percentage of whatever the client received as a reward. I believe that, if I recall correctly, he received a specific sum to represent a client and then would receive a percentage of anything the client received as a reward.

"Q. At the time he left, had you reached agreement (135a) on the question of price? A. No.

"Q. At the time he left, had you reached agreement on the manner of exchanging the property for the money? A. No, we had not.

"Q. Was there still a difference? A. A number of suggestions were made, both by myself and by Mr. La Duca, and I explained to him that no moneys could be surrendered or turned over until each individual item was inspected.

"He told me he would have to discuss any such arrangements with his client and would contact me by telephone the next day. * * *

"Q. And what was the substance of the conversation you had then? A. It was relatively brief. He told me had (sic) spoken with his clients and none

of the methods of transfer and inspection that I had suggested were acceptable and that the amount of $7,500 was completely unacceptable and that his client was still seeking $35,000.

"Q. Did your conversation with him terminate at that time? (136a) A. Yes. He told me he would look forward to visiting me in London and our conversation ended.

"Q. Did you ever speak to him again? A. No."

On *cross*, he testified (R139a-2 to 140a-22):

"Q. Mr. La Duca told you that he was acting as a lawyer for a client, is that correct, sir? A. That's correct.

"Q. And somewhere along the line you posed an ethical question to him, is that correct? In other words, you said, in substance, 'Well, do you think it's right for you to represent someone who may be in possession of stolen property'? * * *

"A. That question arose subsequent to previous conversation. In the previous conversation Mr. La Duca explained to me that the investigation by the private investigator had established that the items his client possessed were stolen and I asked Mr. La Duca that ethical question in similar words, to the effect could he function as an attorney knowing that the client he was representing was the possessor of property that Mr. La Duca now knew was stolen property. * * * He told me he had discussed that particular question with the chairman of the ethics committee of the Bar Association to which he belonged and was assured that he could

engage in this representation without any concern.
* * *

"(140a) Q. And he told you what his interest was in the matter? By that I mean he said 'I am a lawyer. I represent someone who found some articles in a decedent relative's belongings,' is that correct? A. That is basically correct, yes."

He further testified (R149a-18 to 150a-9):

"Q. When you spoke to Mr. La Duca the following day, that would be January 24, 1970, he said to you that his client would not agree on any form that you had proposed whereby the goods would be returned to the owner; is that correct? A. That was part of the conversation.

"Q. Then he also said that his client said that $7500, originally spoken of by Mr. Weinberg, was definitely un-(150a)acceptable to him? A. Yes.

"Q. To the client? A. Yes.

"Q. Now, did La Duca also say that the client said to him 'Forget it,' and that Mr. La Duca then said, 'I am out of the picture, I will not represent him any further'? A. He did say that."

James R. Laughlin, a special agent with the F. B. I. (R157a-18, 19), testified that he had an interview with La Duca on February 4, 1970, at La Duca's law office in Paterson (R157a-24 to 158a-5). He inquired of La Duca as to the identity of his client, in relation to stolen porcelain. "He declined to furnish the name of either client, saying that it was a privileged communication between client and attorney. * * * He said that a client of his, who I term client No. 1, telephoned him and stated that

a friend of his wanted to discuss the return of some property for a reward with he, Mr. La Duca, and at that point client 1 put on this friend of his, which for purposes of identification, I term as client No. 2. Client 2 is the one that had the property to be returned." (R158a-6 to 23). "He had approximately four telephonic contacts (with these two men), according to him, on that date. These contacts were between January 15th and the 24th, 1970, and that each time he had telephonic contact with client No. 2 he first had to call client 1. He stated that he didn't know how to get in touch with client 2 directly. * * * He stated that he had never had any visual contact with client No. 2: it was always on the telephone, and that client 2 had never come to his office. * * * He stated that he knew the client by a name the client had given him but he did not know whether or not it was his true name." (R159a-4 to 19)

Cecil N. Bowie, who had been the deputy foreman of the grand jury before whom La Duca had testified (R176a-11 to 177a-6), testified (R177a-7 to 15):

> "Q. Can you tell this jury briefly what some of the purposes in eliciting his testimony were? A. Well, we were investigating some stolen porcelain and we were trying to find out where the porcelain was and who the thieves were and we were trying to find out also whether Mr. La Duca know whether they were stolen and also whether Mr. Ivler and Mr. La Duca had conspired to move the porcelain from one state to another, knowing that they were stolen."

After the conclusion of Bowie's testimony, the grand jury testimony of La Duca was received in evidence (R190a-22, 23; the text thereof may be found at R331a through 355a).

Thereafter, the following transpired (R124a-5 to 15):

> "Mr. Zapata: Your Honor, the defendant La Duca testified before the grand jury. His grand jury testimony is now Government's Exhibits 14, 15, 16 and 17, and we would like to offer that in lieu of his testimony. * * *
>
> "The Court: Well, the exhibits you mentioned are in evidence.
>
> "Mr. Zapata: Yes, your Honor. I just wanted to establish that I join in the offering of that exhibit as Mr. La Duca's testimony."

The Second Circuit affirmed La Duca's conviction. See judgment appended hereto.

Reasons Why Certiorari Should Be Allowed

(Italics ours unless otherwise noted.)

ARGUMENT

POINT ONE

The Second Circuit has decided an important question of law which has not been, but should be, decided by this court, viz., whether an attorney who negotiates for a client with the owner or insurer of goods stolen in another state for the payment of a reward, and its amount, for the return of such goods to such owner or insurer, is guilty of conspiracy to violate Sections 2314 and/or 2315 of Title 18, where such attorney, on ascertaining from his client that the latter will not return the goods unless he receives a reward in an amount satisfactory to him, notifies the owner or insurer that he, the attorney, is out of the case and will not any longer represent the client.

A conspiracy is a combination or agreement to violate the law. *Miller* v. *United States*, 382 F. 2d 583, 586 (9 Cir. 1967). "A conscious and intentional purpose to break the law is an essential ingredient of the crime. *Landen* v. *United States*, 6 Cir., 299 F. 75." *State* v. *Burns*, 9 N. W. 2d 518, 521 (Sup. Ct. of Minn. 1943). A conspiracy is an agreement among two or more persons "to direct their conduct toward the realization of a criminal objective." *State* v. *Nutley*, 24 Wisc. 2d 527, 129 N. W. 2d 155, 167 (1964).

A. Sections 2314 and 2315 of Title 18 do not make unlawful the interstate transportation of stolen goods to return them to a person legally entitled to them, or to claim a reward in an amount offered by or agreeable to such person.

In construing sections 2314 and 2315, a purpose to penalize an act innocent of intentional wrong will not be imputed to Congress, in the absence of plain language. See *Compagnie Francaise de Navigation a Vapeur* v. *Bliting*, 19 F. 2d 773 (2 Cir. 1927). No language in either section is susceptible of any such penal interpretation. Indeed, this Court, in *United States* v. *Sheridan*, 329 U. S. 379, 385, footnote (1946), ruled to the contrary, as to section 2314, saying:

> "One who knowingly transports stolen goods would do so for one of three sorts of objects, namely: (1) to *dispose of* them or *use* them *unlawfully*; (2) to aid in *concealing* the theft, thus avoiding prosecution for himself or another; or (3) for some purpose wholly innocent, such as to *turn them over to* the police or *the rightful owner*."

The same leniency of interpretation stated in object (3) in the foregoing quotation should be accorded to section 2315. Indeed, objects (1) and (2) in the foregoing quotation pretty well paraphrase the acts condemned in 2315, to wit:

> "Whoever receives, *conceals*, stores, barters, sells, or *disposes of* any goods,"

etc. And the Second Circuit, in construing an earlier statute similar to section 2314, in *United States* v. *Handler*, 142 F. 2d 351, 354 (2 Cir. 1944), cert. den. 323 U. S. 741, says:

"In the statute under consideration we believe that it imports no more than the (unlawful) intent is to deprive the owner of his rights of ownership."

A proper interpretation of sections 2314 and 2315 was well summed up, in the instant regard, by the trial court below in its instructions to the jury. After stating that, under each section, the defendant must have an unlawful intent rather than an innocent intent (R292a-23, 24; 293a-6, 7), the court went on to say (R293a-9 to 23):

"*. *. * It is not unlawful for a man to transport stolen goods which he knows to have been stolen from one state to another for the purpose of delivering those goods to the police or to their true owner. And to intend to do that is not an unlawful intent.

"Moreover, it is not unlawful for a man to inquire whether a reward is being offered for the return of stolen goods which he knows to have been stolen. To intend to do that is not an unlawful intent. However, it *is* unlawful for a man to *demand* the payment of money for the stolen goods which he knows to have been stolen, *if* he makes that payment a *condition* for the return of the goods, that is, if he says, in substance, that he will *not* return the goods which he knows to have been stolen *unless* he is paid money. To intend to do that is an unlawful intent."

B. The Government had the burden of proving that La Duca agreed to the unlawful purpose charged in the indictment, and such burden of proof was not discharged.

As we have seen, the first count of the indictment charged La Duca as having conspired to violate sections 2314 and 2315 of Title 18. In the context of this case, the interstate transportation of stolen goods does not violate those sections if the goods are transported for an innocent purpose, *e.g.*, delivering them to the true owner. *United States v. Sheridan*, *supra*. Such transportation, however, does violate the law if the goods are transported for an unlawful purpose, *e.g.*, delivering them to the true owner as a means of exacting a forced reward, *i.e.*, where the owner is unwilling to pay any reward, or is willing to pay a reward but not as much as is demanded. In the case at bar, the Government had the burden of proving that La Duca *agreed* to a plan not to return the art objects unless and until a reward was paid in an amount acceptable to La Duca's *client*.

A "conspiracy" imports a *concert* of purpose. *United States v. Peoni*, 100 F. 2d 401 (2d Cir. 1938). All conspiracy law "is directed only at those who have intentionally agreed to further the illegal object." *United States v. Stark*, 131 F. 2d 175, 177 (2d Cir. 1942). "In order to establish a person as a participant in a conspiracy, the evidence must show that he personally intended to join and cooperate in the illegal venture." *Miller v. United States*, *supra*, at page 387 of 382 F. 2d. A defendant must join in the illegal scheme, design or agreement to be guilty of violation of the federal conspiracy statute. *United States v. Ford*, 324 F. 2d 999, 1000 (7 Cir. 1963). An indispensable ingredient of conspiracy is that

the accused persons (here, the alleged conspirators) must have had a *common* aim. *United States v. Goss*, 329 F. 2d 180 (4 Cir. 1964).

The evidence at bar failed to establish that La Duca agreed to the illegal purpose charged in the indictment, or to an object that would violate sections 2314 or 2315 of Title 18:

Lawrence Diamond testified (R27a-18 to 21):

> "He (La Duca) said that his client wanted him to find out *if* there was a reward offered for these antiques, if they had in fact been stolen, and wanted to know whether it was *ethical* for him to step (sic) and do *this there* for the client."

Robert McGraw testified (R41a-8 to 11, 21 to 23):

> "The individual on the telephone indicated that his client had come by the property innocently and that he was looking for a reward. * * *
>
> "Q. What were you asked to do, if anything, in connection with this, what was the purpose of the call? A. Primarily to see if a reward would be given."

Hanns Weinberg testified (R60a-21 to 61a-2; 61a-16 to 19):

> "Mr. La Duca told me could it be possible that his client return the goods, *he would advise him to do so*, but he thought perhaps I would consider whether I couldn't make any—he did never ask for anything, but he wanted ask perhaps his client would expect a reward, perhaps.

"(61a) I repeat, he never said I should offer anything. * * *

"But I suggested have the goods delivered to the police and we or the insurance company would deposit a check and I mentions 7½ thousand dollars which should be paid to the finder of the goods, *if* the goods are ours."

And on *cross*, he testified (R92a-4, 5):

"A. Mr. La Duca told me—first he came to us *about concern we get the goods back.*"

Joseph M. Chapman testified (R132-12 to 133-14):

"He (La Duca) told me that his client originally retained a private investigator and the investigator spent *considerable time* trying to determine the identity of the owner of these objects; that when the private investigator was satisfied that these objects had been taken in a theft from the Antique Porcelain Company of New York, the private investigator attempted to determine who the insurer was but because the private investigator was so *costly* the client came to Mr. La Duca and asked him to represent him in achieving a reward for the finding of these items.

"During the conversation I asked Mr. La Duca *how* he felt he could possibly bring about the recovery of these items and considerable time was devoted to coming (133a) to an agreement as to *how* the items could be surrendered for individual *inspection* and a sum or sums of money could be surrendered in exchange for each item or each lot of items that was subsequently inspected and found to be in satisfactory condition. * * *

"* * *. Mr. La Duca said he felt he would have to speak to his client in that regard, but he interjected that he did not feel his client would be satisfied with the amount offered or mentioned by Mr. Weinberg, $7500, that he felt his client was convinced that he was entitled to a greater amount.

"(134a) Q. Did he mention the amount? A. I believe the amount mentioned was $35,000. I asked Mr. La Duca if when we were able to achieve an agreement as to *how* to inspect and transfer these items, whether it would be a lengthy process. And he remarked it would not be. * * *

"Q. *At the time he left, had you reached agreement* (135a) *on the question of price?* A. *No.*

"Q. At the time he left, had you reached agreement on the *manner* of exchanging the property for the money? A. No, we had not.

"Q. Was there still a difference? A. A number of suggestions were made, both by myself and by Mr. La Duca, and I explained to him that no moneys could be surrendered or turned over until each individual item was inspected.

"He told me he would have to discuss any such arrangements with his client and would contact me by telephone the next day."

As of the time La Duca left Chapman, La Duca had been negotiating for his client as to 2 matters: one, the adequacy of the $7,500 reward that had been offered, and two, the manner in which goods would be exchanged for reward money.

As to negotiating as to the amount of the reward, there is no law that says that when a reward *is* offered in a

certain amount, the finder of the missing goods has no right to *ask* for more and *try* to persuade the owner to give more than the original offer. In this case, the representative of the insurer was told about the considerable time spent by a hired special investigator in trying to determine the identity of the owner and the fact that the investigation had been costly. Certainly, it was not illegal for the finder to try to get more than the offered reward by negotiation with the owner, where there had been, presumably, substantial expenses incurred in the hiring of the investigator. Indeed, in at least one state, a *statute* provided as follows:

> "The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, *and* to a reasonable reward for keeping it."

Automobile Ins. Co. of Hartford, Conn. v. *Kirby*, 144 So. 123 (Ala. App. 1932).

As to negotiating as to the manner of exchange of the goods for the money, the finder was within his rights. "(I)t is only a just exposition of (an offer of reward) that the owner does not expect the finder, who has possibly expended time and labor in the recovery of the property, to restore it to him, except on payment of the proffered reward, and that as security for this the finder is to remain in possession of the property until its restoration to the owner, when *the payment of the reward offered is to be a simultaneous act.*" 46 Am. Jur. 121, Title Rewards, section 27.

Let us bear all of the foregoing in mind when we consider what La Duca said to Chapman when the former

called the latter on the telephone the next day, as he had promised (R135a-15 to 23):

> "Q. Did he contact you by telephone the next day? A. Yes, he did.
>
> "Q. And what was the substance of the conversation you had then? A. It was relatively brief. He told me had (sic) spoken with his clients and none of the methods of transfer and inspection that I had suggested were acceptable and that the amount of $7,500 was completely unacceptable and that his client was still seeking $35,000."

However, on cross, Chapman testified (R149a-18 to 150a-9):

> "Q. When you spoke to Mr. La Duca the following day, that would be January 24, 1970, he said to you that his client would not agree on any form that you proposed whereby the goods would be returned to the owner; is that correct? A. That was part of the conversation.
>
> "Q. Then he also said that his client said that $7,500, originally spoken of by Mr. Weinberg, was definitely un-(150a)acceptable to him? A. Yes.
>
> "Q. To the *client?* A. Yes.
>
> "Q. Now, did La Duca also say that the client said to him, 'Forget it,' and that Mr. La Duca *then* said, *'I am out of the picture, I will not represent him any further?'* A. He did say that."

There is nothing in any of the Government's evidence to show that La Duca ever *personally* agreed to or shared in any purpose *never* to return the art objects unless

more than $7,500 was paid for their return: "Criminal liability for conspiracy is predicated upon *personal* guilt." *State v. Burns, supra.* During the negotiations, as we have seen, he made it clear that "could it be possible that his client return the goods, he would advise him to do so", "he did never ask for anything", "he never said I should offer anything" (R60a-21 to 61a-2): "Mr. La Duca told me—first he came to us about concern we get the goods back" (R92-4, 5). The negotiation time was spent by La Duca in relaying to, first Weinberg, and then Chapman what La Duca's *client* wanted and in relaying back to his client Chapman's responses. But when La Duca found out from his client that the $7,500 was definitely unacceptable to the client, and when the latter told La Duca to "forget it," La Duca, in calling back Chapman, told him that he would not represent the client any further (R149a-18 to 150a-9). In support of the presumption of his innocence, it must be presumed that while he intended lawfully to *negotiate* for a reward higher than that offered, he had no intention unlawfully to seek to *force* a higher reward as a *condition* of return of the goods. That presumption still stands, so far as the Government's evidence is concerned.

There was nothing in the "overt acts" of La Duca, set forth in the first count of the indictment (R7a), viz., his conferences with Weinberg and Chapman, from which one may reasonably infer an intent by La Duca to agree to or share in an unlawful enterprise, see *United States v. Acides*, 274 F. 2d 179, 189 (2 Cir. 1960), to violate sections 2314 and 2315 of Title 18.

The Government, in its answering brief, will doubtless refer to the case of *United States v. Hurley*, 281 F. Supp. 443 (D. Conn. 1968). But that case is distinguishable, both on facts and law. There, Hurley, the attorney-negotiator,

was indicted with Mowery and Wehage (who had *recently* stolen the paintings involved) et als., for the *substantive* crime of violating section 2314 of Title 28. Hurley had *personally* brought the paintings from Springfield, *Massachusetts* to New Haven, *Connecticut* to consummate their exchange for money. The indictment specifically charged that on or about March 10, 1967, the defendants did transport and cause to be transported certain stolen paintings from Massachusetts to Connecticut, knowing them to have been stolen.

The District Court, after quoting from *United States v. Sheridan*, *supra*, says, on page 447 of 281 F. Supp:

> "At trial (and in the motions pending before this Court) Hurley contended that this dictum by the Supreme Court effectively insulates his conduct from the statute's provision because he unquestionably believed the paintings eventually would be returned 'to the rightful owner.' The government, on the hand, claimed the Supreme Court's footnote merely indicates that the prosecution does not bear the burden of proof on the issue of 'intent.' The government argued that, having proved *Hurley* transported the paintings across state lines knowing they were stolen, it had established its case-in-chief, and the burden thereupon shifted to Hurley to show 'innocent intent or purpose' or 'lack of criminal intent.'
>
> "The defendant's interpretation must be rejected. The main thrust of the Supreme Court's comments was to make clear that one is exempt under the statute if the forbidden transportation was for a wholly innocent purpose. The examples stated by the Court —the turning over of stolen property to the police or the rightful owner—are conditioned on the premise that there is 'innocent intent or purpose.'

"The government's interpretation is more appealing, particularly since the principle is now well established that *possession* of property recently stolen if, not satisfactorily explained, is a circumstance from which a jury in the light of all the evidence may infer guilty knowledge and participation in the theft. United States v. De Sisto, 329 F. 2d 929, 935 (2 Cir. 1964), cert. denied, 377 U. S. 979, 848 S. Ct. 1885, 12 L. Ed. 2d 747.

"However, the Supreme Court's footnote offers only a possible construction of 18 U.S.C. § 2314. It does not explicitly say that the defendant must bear the burden of proving his innocent intent. Therefore this Court, in an excess of caution, placed the burden of proof on this issue upon the government. See United States v. Byrd, 352 F. 2d 570 (2 Cir. 1965). The instructions to the jury thus were more favorable to the defendant than perhaps was merited, and he cannot now complain."

At the trial in that case, the jury reasonably could have found the following facts, inter alia: After meeting with Wehage and Mowery, who had stolen the paintings, one Rutt, also a defendant, a person reportedly knowledgeable in "fencing" stolen goods, conceived the idea of selling the painting to the owners insurance company for a "reward." After some negotiations with one MacFarlane, an F.B.I. agent who was posing as a representative of the insurance company, Rutt and MacFarlane agreed that the company would pay $25,000 for the return of the paintings, Rutt telling MacFarlane that his lawyer, Hurley, would handle the remaining details. Thereafter, Rutt promised Hurley a $5,000 fee, and Hurley telephoned MacFarlane to tell him that delivery would be made for $25,000.

Two days later, Hurley spoke again to MacFarlane, and requested a $2,000 fee from the company, indicating that the individuals who had the paintings desired to clear $25,000 for themselves.

In that case, it was clear that Hurley was proven *not* to have an innocent intent. The amount agreed to be paid to his clients as a "reward," or payment for the return of the paintings, was $25,000. Hurley himself asked directly for a $2,000 *fee* from the insurance company, in *addition* to the "*reward*" to his clients. It was not a case, as here, where the attorney removed himself from the matter when he ascertained that his client wanted to force a higher reward than the one offered. It was a case where the attorney himself asked a direct payment to himself from the company, over and above the agreed reward to his clients, as payment for services rendered, not for the insurance company, but for his own clients. He himself was attempting an exaction from the company of money to which he was not in any conceivable way entitled to receive from the company. He, therefore, was not transporting the stolen goods across state lines for an innocent purpose.

It is true that, in *United States* v. *Sheridan*, *supra*, this Court did say that "proof of the innocent intent *might* be required as matter of defense, the other elements being made out," and that, in *United States* v. *Hurley*, *supra*, the court placed the burden of proof on this issue upon the Government, only "in an excess of *caution*." However, in the case at bar, the burden of proof is *truly* upon the Government to prove an *absence* of innocent intent. Here, we have a *conspiracy* charge, indispensable to whose proof is the element of *agreeing* to the unlawful purpose charged. *United States* v. *Peoni*, *supra*, *et seq.*, *supra*. Here, it was incumbent upon the Government to prove that La Duca

agreed to an interstate transportation of stolen goods for the unlawful purpose of *forcing* the owner of the goods to pay for their return an amount more than it was willing to pay, or had offered to pay, as a reward. The Government failed to prove that La Duca *agreed* to any such purpose.

POINT TWO

The Second Circuit has decided important questions on the law of perjury before a grand jury, which decision is in conflict with applicable decisions of other courts of appeals, viz.:

> **If any one of conjoined questions can truthfully be answered "no," can a "no" answer to the whole of the conjoined questions be perjury?**
>
> **Can perjury be validly assigned where an answer is literally accurate, technically responsive or legally truthful?**
>
> **Can perjury be validly assigned where an answer under oath is met by no more than a prior unsworn inconsistent statement?**
>
> **Can perjury be founded upon the answer to a question admitting of several plausible meanings?**

The questions and answers set out in Count Two of the indictment (R5a) are here repeated verbatim, each set being numbered consecutively:

1—"Q. Did he say whether it had disclosed whether they were stolen or why these articles were newsworthy? Did he ever tell you that they were stolen?
"A. No.

2—"Q. Did he say if the private detective had discovered that they were stolen?
"A. No.

* * *

3—"Q. Well, how about a report that you found out that they had been stolen from a Mr. Weinberg?
"A. I think we ultimately discovered that, whether the client knew it or not, I don't know, but I discovered it.

4—"Q. How did you discover it?
"A. We went in to see Mr. Weinberg.

* * *

5—"Q. You didn't know that these belonged to Mr. Weinberg prior to the time that you called Toplis & Harding?
"A. No."

It should be noted that, during argument on motion for La Duca's acquittal, the trial court said (R244a-23 to 25):

"* * * I have grave doubt as to whether the government has proved enough to go to the jury on this count;"

for perjury.

A. Question-and-answer No. 1 was not proven false.

No. 1 is as follows:

"Q. Did he say whether it had disclosed whether they were stolen or why these articles were newsworthy? Did he ever tell you that they were stolen?
"A. No."

The word "it" in the question refers to the newspaper item in the box with the articles; "he" refers to La Duca's client.

1. The question in No. 1 was in 3 parts and if the answer to any one of those parts was true, there could be no perjury.

The foregoing question asked for a response on 3 different things:

Did the client say to La Duca whether the newspaper item disclosed that the articles were stolen?

Did the client say to La Duca whether the newspaper item disclosed why those articles were newsworthy?

Did the client ever tell La Duca that the articles were stolen?

It is a familiar rule of pleading that a conjunctive denial is an ineffective denial of the several conjoined statements for the reason that, if any one of them is not true, the conjunctive denial would be true. This rule would seem to be peculiarly applicable to a situation where a defendant is charged with perjury in answering "no" to several conjoined questions. If the answer "no" to any one of the conjoined questions is true, then the answer "no" to all of the conjoined questions is true. *See Lee v. United States*, 49 F. 2d 241, 244 (9 Cir. 1931).

2. There was no proof that the client said to La Duca whether the newspaper item disclosed why the articles were newsworthy.

[illegible] stated that the client said to La Duca whether the newspaper item disclosed why the articles were newsworthy. It would follow, from this alone, that perjury was [illegible] question and answer No. 1.

3. There was no proof that the client told La Duca that the articles were stolen.

No witness testified that the client *told* La Duca, in so many words, that the articles were stolen. The answer to this part of the question was, therefore, legally truthful. There can be no lawful conviction in a perjury case where an answer of the defendant under oath to a question propounded to him is *literally* accurate, *technically* responsive, or *legally* truthful. *Smith* v. *United States*, 169 F. 2d 118 (6 Cir. 1948). In *Hart* v. *United States*, 131 F. 2d 59, 61 (9 Cir. 1942), the court says:

> "* * * If the defendant's answers to questions were legally truthful, she cannot be held for perjury."

4. In any event, the only evidence as to question-and-answer No. 1 consists of alleged oral admissions of La Duca's purportedly contrary to the allegedly perjurious answer in No. 1.

The only witnesses called by the Government in support of the perjury charge concerning question-and-answer No. 1 were witnesses whose testimony was limited to prior oral statements made to them by La Duca. "(A) perjury conviction may not be had *solely* on the basis of oral admissions contrary to the allegedly perjurious statement, even if *several* witnesses testify to the admissions." *United States* v. *Goldberg*, 280 F. 2d 729, 733-734 (2 Cir. 1961). "(W)ithout more, there is no basis for the jury's finding the testimonial utterance rather than the inconsistent one to have been false." Id. 734. "In view of the strong presumption of innocence, and because of the solemnity of an oath, credit must be given to what defendant said under oath, rather than to what he may have said to the contrary when not under oath." *Hart* v. *United States*, supra.

B. Question-and-answer No. 2. was not proven false.

No. 2 is as follows:

> "Q. Did he (the client) say if the private detective had discovered that they were stolen?
> "A. No."

The only evidence as to the foregoing consists of an alleged oral admission of La Duca to the Government witness Chapman (R132a-15 to 17). That does not suffice. See subpoint A. 4., *supra*.

C. Question-and-answer No. 3 was not proven false.

No. 3 is as follows:

> "Q. Well, how about a report that you found out that they had been stolen from a Mr. Weinberg?
> "A. I think we ultimately discovered that, whether the client knew it or not, I don't know, but I discovered it."

1. The question was too ambiguous to be a valid foundation for perjury.

There was no evidence to show what the question meant to La Duca when he answered it. Indeed, in considering question No. 3, the court below said (R249a-24 to 250a-2):

> "Now, with all charity, that is not a very good question. 'Well, how about a report'—I don't know what a man is supposed to say in answer to that * * *".

In *United States* v. *Wall*, 371 F. 2d 398, 400 (6 Cir. 1967) the court says:

> "* * * In a case where the question propounded admits of several plausible meanings, the defendant's

belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer. * * *

"There was no evidence to show what the question meant to Mrs. Wall when she answered it. In the absence of such evidence, no determination could be made as to the falsity of her answer. The evidence was insufficient to support the conviction."

2. There was nothing wrong with the answer.

In a colloquy below, the following appeared (R250a-7, 8):

"(The Court) Anything wrong with that answer?
"Mr. Nields (Government counsel): Nothing."

D. Question-and-answer No. 4 was not false.

No. 4, a follow-up to No. 3, *supra*, is as follows:

"Q. How did you discover it?
"A. We went in to see Mr. Weinberg."

In the same colloquy below, the following appeared (R250a-11 to 13):

"(The Court) Anything wrong with that so far?
"Mr. Nields: Well, your Honor, I wouldn't want to rest a perjury on just that answer."

E. Question-and-answer No. 5 was not proven false.

No. 5 is as follows:

"Q. You didn't *know* that these *belonged* to *Mr. Weinberg* prior to the time that you called Toplis & Harding?
"A. No."

The answer was not proven false by any witness for the Government. The crux of the Government's assignment of perjury No. 5, supra, is revealed in the following colloquy below (R25a-8 to 17):

> "The Court: And that is wrong, that is untrue!
>
> "Mr. Nields: Yes, your Honor. He (La Duca) * * * told the name *Antique Porcelain Company of New York* to Mr. McGraw. We know from Mr. Diamond he had the newspaper article containing the *place* from which it had been stolen and we know from Mr. Chapman that the private investigator had told the client who had told Mr. La Duca that the property, he believed, came from the *Antique Porcelain Company of New York*."

That was not enough to sustain the charge. There was no proof that, before La Duca called Toplis & Harding, when he first talked to Mr. McGraw (R38a-9 to 39a-7), La Duca *knew* that the articles *belonged* to *Mr. Weinberg*. Even *Mr. McGraw* did not know that (R40a-25 to 41a-4):

> "Q. Do you know who owns the Antique Company of New York? A. I know a Mr. Hanns Weinberg who is the associate. I don't know if he is the owner of the corporation or what, but I know he is associated with them."

The Government proved no more than that, up to the time he called Toplis & Harding, La Duca "knew" that the articles in question had purportedly been stolen from the Antique Porcelain Company of New York. His denial that, prior to the time in question, he *knew* that the articles *belonged* to *Mr. Weinberg*, therefore was *literally* accurate, *technically* responsive and *legally* truthful. He

was therefore not validly convicted of perjury on the basis of that denial. *Smith* v. *United States*, supra; *Hart* v. *United States*, supra.

To hold otherwise is to assume that because La Duca "knew" that the property came from the Antique Porcelain Company of New York, and that that was the place from which it had been stolen, he not only might have known and ought to have known, but *must* have known, that the property *belonged* to *Mr. Weinberg*. The latter assumption is clearly unwarranted, and it therefore results that the verdict against him rests in reality upon plausible conjecture and not upon proof of incriminating facts. See *Wolf* v. *United States*, 238 F. 902, 906 (4 Cir. 1916).

CONCLUSION

It is therefore respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

RICHARD M. GLASSNER,
Attorney for Petitioner.

SAM WEISS,
Of Counsel.

[APPENDIX FOLLOWS]

APPENDIX

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of October one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY R. LADUCA, *et al.*;

Defendants,

ANTHONY R. LADUCA,

Defendant-Appellant.

Judgment of the United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. Daniel Fusaro
Clerk